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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

EARL L. STAGER,

Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
A FLORIDA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI, EITHER TO THE SUPREME COURT OF FLORIDA OR THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, JOINTLY OR IN THE ALTERNATIVE.

Earl L. Stager, by his attorneys, Richter, Lord, Toll & Cavanaugh, Esquires, respectfully petitions that a Writ of Certiorari issue to review the order of the District Court of Appeal of Florida, Third District, entered April 7, 1964; or jointly or alternatively, to review the discharge of the writ of certiorari to said District Court of Appeal by the Supreme Court of Florida, entered April 28, 1965.

OPINIONS BELOW.

The opinions of the District Court of Appeal of Florida, Third District (reported at 163 So. 2d 15), and of the Florida Supreme Court discharging the writ of certiorari to said District Court of Appeal are to be found in the appendix hereto. Together, these constitute a final judgment in the State of Florida, where judgment was entered for plaintiff affirming the judgment of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, in favor of your petitioner in the amount of $15,000.00. This was a miniscule award considering petitioner's injury and loss and was demonstrably the result

of shockingly unfair, blatantly hostile, and prejudicially erroneous trial rulings and jury instructions. Hendry, J., of the District Court of Appeal of Florida, Third District, dissented without opinion.

JURISDICTION.

The order of the District Court of Appeal of Florida, Third District, was entered April 7, 1964. The order of the Supreme Court of Florida discharging a writ of certiorari to said District Court of Appeal was entered April 28, 1965. The jurisdiction of this Court is invoked under the Act of June 25, 1948 c. 646, 62 Stat. 929, 28 U. S. C. § 1257(3), because the construction of a federal statute is involved and a right or privilege is claimed under the Constitution of the United States.

Petitioner opines that your writ issues to the District Court of Appeal of Florida, Third District, as the highest court of the state of Florida in which a decision could be had: *Woods v. Neirstheimer,* 328 U. S. 211; 66 S. Ct. 996 (1946); *Tucker v. Texas,* 326 U. S. 517; 66 S. Ct. 274 (1946). But since the Florida Supreme Court had a discretionary right of review, petitioner perforce invoked such discretion: *Stratton v. Stratton,* 239 U. S. 55; 36 S. Ct. 26 (1915); *Mathews v. Huwe,* 269 U. S. 265-6; 46 S. Ct. 108 (1925). When the Florida Supreme Court declined to exercise its discretionary authority, the judgment of the Third District Court of Appeal of Florida, rather than the discharge of the writ by the Florida Supreme Court, is the judgment reviewable under § 1257: *Sullivan v. Texas,* 207 U. S. 416; 28 S. Ct. 215 (1908). Where, as here, the highest State court refuses its discretionary jurisdiction to review the decision of a lower State court, the time for filing the petition runs from the date of the refusal to review: *American Railway Express Company v. Levee,* 263 U. S. 19, 20-21, 44 S. Ct. 11, 12 (1923).

Your petitioner prays, however, that your writ issue to either of said State courts, jointly or in the alternative, lest it appear that the jurisdiction of the Florida Supreme Court is not discretionary, but mandatory.

QUESTIONS PRESENTED.

1. In this suit under the Employer's Liability Act (45 U. S. C. A. § 51, et seq.) did not the trial court deliberately flout the intent and purpose of the Congress as expressed in the Act when it allowed the railroad to bring forth testimony to the effect that petitioner had assumed the risks of his employment; in allowing the railroad to argue that such assumption of risk was contributory negligence; in refusing to rule contributory negligence out of the case as a matter of law; in instructing the jury to consider whether petitioner was contributorily negligent; and, most damagingly, in refusing to instruct the jury that the defense of assumption of risk was not available to the railroad?

2. In this suit under the Employer's Liability Act (45 U. S. C. A. § 51, et seq.) was not petitioner deprived of a fair trial upon the merits of his cause under Amendment VII to the United States Constitution and denied due process of law as guaranteed by Amendment XIV thereto; and was not the province of the jury invaded by the trial court when, utilizing state procedures, it withheld from the hearing of the jury properly adduceable material facts vital to the presentation of petitioner's cause; and did it not abuse its judicial discretion when it prevented a fair trial by the exclusion of critical, non-cumulative relevant evidence on the issue of damages?

THE STATUTE AND CONSTITUTIONAL PROVISION INVOLVED.

1. The Federal Employer's Liability Act, 45 U. S. C. § 51, August 11, 1939, Chapter 685, 53 Stat. 1404, which reads in pertinent part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

2. Section 54 of the same act which reads:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to * * * any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

3. Amendment VII to the United States Constitution which reads:

"In suits at common law, * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the Rules of the Common Law."

4. Section 1 of Amendment XIV to the United States Constitution which reads in pertinent part:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Petitioner, Earl L. Stager, was on February 10, 1961, a railroad engineer earning $9,000.00 per annum who had, in the normal course of events, a work expectancy of 22 years (R. 687). He was in excellent physical condition and had no history of back trouble (R. 688).

On the morning of that day he was ordered to operate a train of perishables out of Fort Pierce, Florida, departing at 5:15 A. M. (R. 636, 688). With the rest of his crew he duly reported for duty, as required, 30 minutes in advance of scheduled departure (R. 688, 768, 769, 778).

Having signed in and discovered on which engine they were to work, he, his brakeman and fireman boarded the engine rather than "stand out there in the dark" (R. 611), pestered by sandflies and mosquitoes (R. 617).[1] While on the engine, Stager checked the engine's brakes, fuel, safety appliances, wheels, brake shoes, couplers, running gears and lights—the obvious preliminary duties of an engineer while waiting for the next movement. The fireman also performed his preliminary duties (R. 942).

1. Compare: *Gallick v. B. & O. Ry. Co.*, 372 U. S. 108, 83 S. Ct. 659 (1964) where the defendant railroad was held to have failed to provide a safe place to work in similar conditions.

This completed, Stager sat in the engineer's seat to await completion of the train (R. 611, 694). A switching engine came along and moved his engine with its already attached cars to couple them to other standing cars. When the ground crewman failed to relay the coupling crewman's back-up and stop signals (R. 569, 572, 593-596) as required by railroad practice, to the switching crew's engineer, there was a too fast, rough coupling, resulting in a "pretty good crash" (612). This is the essence of the case. *The accident happened only because of the admitted fault of petitioner's fellow employee.* The jar jammed Stager's leg into his back, and he immediately complained of back pains (R. 612, 613).

Railroad negligence under the FELA was thus easily and clearly established (R. 582). The jury so found in the teeth of erroneous evidentiary rulings adverse to petitioner by the trial court of which we need not and therefore do not presently complain, purely to achieve that economy of expression so necessary in a petition for certiorari.

But the jury award was only $15,000.00—almost $5,000.00 less than the admitted special damages.[2] To reach the verdict rendered, the jury must have found that Stager who has twice undergone major back surgery for the injuries sustained, either,

(a) was not permanently or seriously disabled, or,

(b) was guilty of contributory negligence.

(a) *Was Stager Disabled?*

All the doctors who actually treated Stager and who were permitted to testify were of the opinion that Stager could never railroad again. The trial court, by its rulings prevented this unanimity of opinion from being told to the jury.

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2. Admitted medical expenses were $2,750.00; admitted wage loss to date of trial was $17,200.00 (R. 1078, 1079).

The astounding mechanics of how this shockingly unfair and atrocious suppression of relevant, material, indeed critical, evidence by the trial court was achieved will be detailed infra. Suffice it to say at this time that the jury was falsely misled into believing that there was a conflict of medical testimony concerning the extent of Stager's disability because the Court blocked a court-appointed doctor from giving his full explanation, diagnosis and prognosis and the jury got a false impression that he disagreed with the testimony of Stager's medical witnesses.

(b) *Stager Was Not Contributorily Negligent.*

Railroad counsel vigorously argued that Stager was contributorily negligent in boarding the engine *knowing* that switching, which would ultimately involve a coupling, was still to be done (R. 1086, 1087, 1088). This, of course, is classically the defense of assumption of risk. The Court refused to charge assumption of risk out of the case and allowed defense counsel to argue it under the guise of contributory negligence. The trial judge erred both in refusing to direct a verdict in Stager's favor on the issue of contributory negligence (R. 982, 992) and in failing to instruct the jury, as requested by Stager, that a railroad employee does not assume such a risk of his employment (R. 165, 999, 1000).

It was admitted that Stager was on duty at the time and was being paid for it (R. 769); that he violated no railroad rule in so boarding the engine (R. 770-773); and that he had no control over the negligent switching operation (R. 701).

REASONS FOR GRANTING THE WRIT.

In the case at bar, a state court has launched a novel assault upon the liberality of the FELA, this time from the angle of damages. The methodology of this particular form of attack is no less an invasion of the jury function because it utilizes state procedure to distort and block out relevant evidence and to instruct the jury on non-existent defenses. Your petitioner has not had the benefit of a jury trial on the issue of damages and an authoritative pronouncement from your Court is urgently required for the following reasons:

I.

There is a direct conflict between the decision below and those of the Second and Fourth Circuits in *Kodack v. Long Island R. R. Co.*, 342 F. 2d 244 (1965), and *Smith v. United States*, 336 F. 2d 165 (1964), respectively, as to the existence of contributory negligence upon the facts of record herein.

II.

The holding below is yet another example of the prevailing confusion and conflict as to the propriety of instructing juries that the defense of assumption of risk is not available in an FELA action. Here the railroad was allowed to revive it disguised as contributory negligence without cautionary jury instruction. This was a flagrant breach of the majority admonition in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67; 63 S. Ct. 444, 451 (1943), that "assumption of risk, must not, contrary to the will of Congress, be allowed recrudesence under any other label in the common law lexicon." To illustrate the grave conflict of authority and the confusion prevailing:

i) Florida and Missouri leave the giving or granting of an instruction on assumption of risk to the discretion of the trial judge: *Stager v. F. E. C.*, 163 So. 2d 15, Fla. App. 1963; *Kiger v. Terminal Ass'n, etc.*, 311 S. W. 2d 5, Mo. Sup. 1958.

ii) The Fifth Circuit and California hold such an instruction to be erroneous whatever the facts: *Texas & P. Ry. Co. v. Buckles*, 232 F. 2d 257, cert. den. 351 U. S. 984, 76 S. Ct. 1052; *Minehart v. So. Pac. Co.*, 136 C. A. 2d 486, 288 P. 2d 999 (1955).

iii) The majority adopt the view that the jury should be instructed upon the distinction between contributory negligence and assumption of risk when the facts warrant: *Koshorek v. P. R. R.*, 318 F. 2d 364 (3rd Cir. 1963); *Atlantic Coast Line R. Co. v. Burkett*, 192 F. 2d 941 (5th Cir. 1951); *Wantland v. Illinois Central R. Co.*, 237 F. 2d 921 (7th Cir. 1956); *Johnson v. Erie R. Co.*, 236 F. 2d 352 (2nd Cir. 1956); *Thomas v. Union R. R. Co.*, 216 F. 2d 18 (6th Cir. 1954); *Borrero v. Elgin, etc., Ry. Co.*, 28 Ill. App. 2d 362, 171 N. E. 2d 673, cert. den. 368 U. S. 891, 82 S. Ct. 144, reh. den. 368 U. S. 936, 82 S. Ct. 359 (1961).

Even so, many such courts apply the concurring opinion in *Tiller, supra*, to warn trial courts against mentioning assumption of risk except in the clearest cases: *Dilley v. Chesapeake & Ohio R. Co.*, 327 F. 2d 249 (6th Cir. 1964). The concurring opinion is not the law.

III.

Petitioner was denied due process of law and the province of the jury was blatantly invaded by the trial court's exclusion of necessary, pertinent evidence on the issue of damages (a) by unfair, inexplicable pre-trial limitation of medical testimony and (b) by erroneous, unjust restriction upon petitioner's right to cross-examine.

ARGUMENT.

Point One.

Failure to Direct Verdict in Petitioner's Favor on Issue of Contributory Negligence and Failure to Instruct Jury That a Railroad Employee Does Not Assume the Risk of His Employment.

The railroad argued as its defense that Stager boarded his engine though he "*knew* they were switching, that there was switching to be done, they should not have been on there" (R. 1086) and "was he not negligent in getting on this train, into this situation, *knowing* that all that weight was there that had to be transferred about in coupling?" (R. 1088).

This was the only defense argued by the railroad, though Stager was admittedly on duty, was performing his duty and was being paid for working at the time he boarded his engine (R. 769). Moreover, he admittedly violated no railroad rule in boarding it (R. 770-773) and had no control over the negligent switching operation (R. 701).

Nevertheless, the trial court refused to direct a verdict in petitioner's favor on the issue of contributory negligence (R. 982, 992); it charged on contributory negligence (R. 1106, 1111, 1112); and it refused to instruct the jury, as requested, that a railroad employee does not accept the risks of his employment.

The appellate court below held that the failure to direct a verdict on contributory negligence was justified because petitioner failed to brace himself *knowing* "of an obvious condition which could result in sudden stops or jerks" (Appendix 5a). The most minute examination of the record fails to disclose a shred of evidence that Stager was not braced or that "bracing" was advocated by the railroad or instructed upon by the trial court. Indeed, the contrary appears. Stager was braced for a

normal coupling impact (R. 726, 730) and railroad counsel did not investigate the matter when cross-examining the only other eyewitness, Almond.

The absurdity of the railroad's position appears when it is remembered that railroad engineers couple their engines literally millions of times a year without injury[3] and that if this crash had injured the *switching engineer* rather than Stager, the railroad would have had no possible defense. Legal analysis reveals the railroad defense to be a meretricious exhumation of the extinct doctrine of assumption of risk bedecked in the trappings of nonexistent contributory negligence—an exhumation and disguise anticipated and forbidden in *Tiller v. Atlantic Coast Line R. Co., supra.*

A. Bracing for Shocks and Jerks.

The appellate court below held that the trial court rightly refused to direct a verdict for plaintiff and properly instructed the jury on contributory negligence because Stager, as one *knowing* of "an obvious condition which could result in sudden stops and jerks", did not brace himself. It cited but one authority decided after the 1939 Amendment to the FELA (45 U. S. C. A. § 54) which abolished the defense of assumption of risk. That case, *Davis v. F. E. C.*, 138 So. 2d 97, Fla. App. 1962, emanated from the same Third District Court of Appeal of Florida as a short per curiam to the effect that contributory negligence exists when injury occurs to an employee who fails to brace himself, *after warning,* of a coupling impact. Insofar as it appears from *Davis* that a warning was deliberately ignored, the decision appears to be correct. Here, in this case, there is not a shred of evidence that petitioner was warned of an extraordinary impact. Seldom, in any

3. We commuters who board uncompleted trains ahead of time the more comfortably to read our papers, ought to be more apprehensive about coupling operations, if the court below is correct—we are not protected by the comparative negligence rule of the FELA.

event, is one given an effective warning that another is about to be negligent.

The burden was upon the railroad to prove contributory negligence: *Page v. St. Louis Southwestern Ry. Co.*, 312 F. 2d 84 (5th Cir. 1963). The burden was upon the railroad to adduce evidence that there was sufficient warning before the impact to permit Stager to brace himself (if he could) against the crash of an abnormal coupling. What was said in *Kodack v. The Long Island R. R. Co.*, 342 F. 2d 244 (2nd Cir. 1965) at page 247 governs the facts of this case, viz.:

> "However, the railroad failed to adduce evidence that there was sufficient warning before the impact to permit Kodack to act. The engineer testified he told the fireman to apply the brakes about thirty feet from the collision, which, given the train's speed, was one third of a second. Even assuming that the fireman's reaction and the operation of the air brakes were instantaneous, the time lapse before the collision could not have been sufficient to give even an experienced trainman time to brace himself."

Therefore, in that case, under circumstances less favorable to the employee than here, the Second Circuit ruled contributory negligence out of the case *as a matter of law.*

In the case at bar, the switching crewman who negligently failed to relay the signals vividly described the absence of warning when he testified (R. 596):

> "A. Well, Mr. Hurley [the switching foreman]—the first I knew, Mr. Hurley had moved out quickly like, and then we had a bang."

Insofar as the appellate court below holds that on the facts of this case petitioner was adequately warned to brace himself because he knew there was to be *a* coupling, it is in stark conflict with *Kodack, supra.* Inasmuch as practically

every railroad accident involves sudden impacts which throw railroadmen around, an authoritative pronouncement by your Court is emphatically indicated lest railroad counsel meretriciously, and ultra-conservative state courts gleefully, seize upon the decision below as authority to find contributory negligence where none exists.

Perhaps no case shows such clear insight to the problem confronting the petitioner in this case than does the opinion of Chief Judge Biggs in Koshorek v. P.R.R., 318 F. 2d 364 in discussing the problem of assumption of risk as it arises in Federal Employer Liability Act cases. At p. 367 Judge Biggs said:

> "The doctrine of comparative negligence has been a part of the Federal Employers' Liability Act since its original enactment. See 45 U.S.C.A. §53.[10] The original Act also incorporated the doctrine of assumption of risk, which provided a full defense for the carrier except in cases where the injury resulted from the carrier's violation of safety statutes. 35 Stat. 66 (1908)[11]. In 1939, however, the Act was amended and the defense of assumption of risk abrogated in all cases where the injury resulted from the negligence of the carrier. 53 Stat. 1404 (1939), 45 U.S.C.A. §54.[12] See Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); Atlantic Coast Line R.R. v. Burkett, 192 F. 2d, 941 (5 Cir. 1951).[13]

[2] The retention of the doctrine of comparative negligence and the abrogation of the defense of assumption of risk necessitates that a careful distinction between the two concepts be made in a case such as that at bar arising under the Act. If Koshorek's own conduct in relation to his injury be characterized as contributory negligence the Railroad may have a partial defense as to the amount of damages. If the same conduct be found to have constituted assumption of risk Koshorek's right to recover could not be affected in any respect. In Prosser, Torts, §55 (1955), 304-305, it is stated: ' *** [W]here the two defenses overlap, there is a great deal of confusion of the two. Ordinarily it makes little difference which the defense is called. The distinction may become important, however, under such statutes as the Federal Employers' Liability Act, which has now abrogated the defense reducing the amount of recovery. In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. The two may co-exist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious

> that he must be taken to have known of them, and risks which he merely might have discovered by the exercise of ordinary care.' See also Potter v. Brittan, 286 F. 2d, 521 (3 Cir. 1961)."

Judge Biggs analyzed the decision in Atlantic Coast Line R.R. Co. v. Burkett, 192 F. 2d, 941 and summarized that opinion sustaining the view here proposed by the petitioner when at p. 369:

> ". . . The Court of Appeals for the Fifth Circuit held that the inclusion of a reference to assumption of risk in the charge to the jury was proper. '[W]e think that the trial judge was justified in thinking that in the absence of a charge on assumption of risk, the jury might have considered that defense under the guise of non negligence. ***' Atlantic Coastline R. Co., v. Burkett, supra. 192 F. 2d, at p. 943."

In Koshorek v. P.R.R., supra, Judge Biggs continued at p. 369:

> "Koshorek testified that the air in the shop contained dust and it follows that he either knew or should have known that inhalation of excessive dust over an extended period of time might cause him harm. Because of this the jury reasonably could have believed or inferred that he himself was responsible

for the harm that befell him. As we have said, the trial judge instructed the jury on the applicability of the doctrine of comparative negligence but did not distinguish and exclude from its scope those aspects of the plaintiff's conduct with regard to his employment which, prior to the 1939 amendment, would have been categorized as the doctrine of assumption of risk. He should have done so for the distinction between the two kinds of conduct is often very difficult even for a court to make and a jury of laymen scarcely can be expected to do so successfully."

". . . Had an adequate distinction between conduct constituting contributory negligence and that which would have constituted assumption of risk been pointed out to the jurors in the charge, the jury might well have reached a different verdict. In our opinion the failure to charge properly as to this distinction constituted reversible error under the circumstances."

The zealous perceptive caution expressed by Chief Judge Biggs reflects itself as an absolute necessity in the instant case where counsel for the respondent barefacedly and openly argued that petitioner assumed the risk of his employment when he boarded the locomotive preparatory to coupling. The argument he made ran along the line that petitioner knew that cars would be coupled to the engine and that therefore he had no cause to complain if he was injured because such a coupling was made. Clearly that is a risk

that was outlawed by the Amendment of 1939; and if the coupling was made in a rough manner it was negligence which the petitioner had no duty to anticipate. This had to be spelled out for the jury so that it would understand the law. Not to do so was to leave the jury in complete confusion and allow it to conclude that assumption of risk could serve in mitigation of damages. This is not permissible. The duty of the Judge to clarify the law and to relate it to the facts is a necessity which cannot be ignored, particularly when requested by the parties and the issue is brought to the court's attention. As was said in Pritchard, Adm. v. Liggett & Myers Tobacco Co., C. A. 3, decided July 26, 1965:

> "Absent such a differentiation, the instructions as given did not correctly relate the law to the issue and were therefore erroneous. Atkinson v. Roth, 297 F. 2d, 570, 574 (3rd Cir. 1962); McNello v. John B. Kelly, Inc., 283 F. 2d 96, 101, 102 (3rd Cir. 1960)."

And to allow assumption of risk to get into this case under the guise of contributory negligence when there was no evidence to support that defense is likewise prejudicial error and commented on in the slip opinion in Pritchard v. Liggett & Myers Tobacco Co., supra, where the Court said:

> "It was also error to submit the issue to the jury in the absence of evidence to support the defense. Morran v. Pennsylvania Railroad Company, 321 F. 2d, 402 (3rd Cir. 1963); O'Neill v. Reading Com-

knew that a crane periodically swung large stones overhead, was injured when a stone fell upon him. Held, his mere knowledge of the risk was not enough to raise the defense of assumption of risk unless he also knew that his employer would be negligent in not warning him when the crane was about to swing stones overhead.

Much confusion arises when an actor's "knowledge" is used as a synonym of "foreseeability". True, contributory negligence is conduct which involves an undue risk of harm to the actor himself: Prosser, Law of Torts, 2d Ed. 285. Undoubtedly, the actor whose imprudence places him in a position of danger is charged with the duty of foreseeing the possibility of danger. This does not mean, though, that knowledge of one risk is legal foreseeability of the enlargement of that risk by another's negligence.

Contributory negligence is the acceptance of the particular risk whereby the actor was injured. For example, he who stands on the platform of a streetcar does not accept the risk of a collision: Prosser, supra, page 286 and cases there cited. Prosser says that this latter exception to the general rule that imprudence of the actor is contributory negligence is not really the same as saying that contributory negligence must be the proximate cause of the accident. Nevertheless, Federal courts and most State courts hold that the plaintiff's imprudence, if any, must be the proximate cause of his injury: General Portland Cement Co. v. Walker, 293 F. 2d 294 (5th Cir. 1961)--applying Florida law; Buchanan v. U.S., 305 F. 2d 738 (8th Cir. 1962); Sizemore v. U.S.

Lines Co., 213 F. Supp. 76, aff'd. 323 F. 2d 774; Ditter v. Yellow Cab Co., 221 F. 2d 894 (7th Cir. 1955); Dickerson v. American Sugar Refining Co., 211 F. 2d 200, 202 (3rd Cir. 1954); Fish v. Ball, 93 F. 2d 853, 855 (10th Cir. 1937); Restatement of the Law of Torts, Negligence, §§ 462, 463, 465.

Stager's conduct on the morning in question in no way caused the accident. Assuming arguendo only, that Stager had no particular obligation to be on the engine,[4] he was no trespasser (R 772), he broke no law, nor violated any safety rule of the railroad (R. 775). We know of no law which holds even a licensee guilty of contributory negligence in being merely where he is allowed to be: Cf.: Billings & Sons, Ltd. v. Riden, [1958] A.C. 240, 255 (Eng., H. of L.)

Again, Stager's knowledge of one danger, i.e., that from normal couplings, does not, as a matter of law, charge

4. On the posture of the record we so assume. The trial court prevented Stager producing testimony that it was customary for road crews to board their train ahead of time (R. 613, 692) but arbitrarily allowed the railroad to adduce contrary testimony (R. 787-789); Cf.: Broadley v. Union Ry. Co., 132 F. 2d 419 (6th Cir. 1943).

him with knowledge of increased dangers arising from railroad negligence: *Smith v. United States,* 336 F. 2d 165, 168 (4th Cir., 1964). To be sure, contributory negligence may consist in a failure to discover or appreciate a reasonably foreseeable risk. But foreseeability is not clairvoyance. The law does not require one to circumscribe his activities until the fact of negligence becomes apparent: *Prosser, supra,* pp. 288, 289. In the case at bar, on these facts, an instruction upon contributory negligence is tantamount to an instruction that he had assumed the risk of both negligent and non-negligent eouplings: *Smith v. U. S., supra;* Cf., *Independent Nail and Packing Co. v. Mitchell,* 343 F .2d 819, 822 (1st Cir., 1964). This is surely a recrudesence of assumption of risk under the label of contributory negligence; a recrudesence barred by this Court in *Tiller, supra.*

Qua this accident, Stager was without "fault". His actions were the very natural and respectable, even commendable, acts of an honest workman who gets on with the job even if there is no necessity for him to do so earlier than required. That his actions were entirely reasonable is indicated by the fact that the two other members of his crew also boarded the engine with him. It has never been the law that a "reasonable man" must be a paragon of circumspection.

> "Undoubtedly, questions of negligence . . . are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as one or the other may be proper, *where the evidence is undisputed, or is of such conclusive character* that the court, in the exercise of sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it (citing cases). 'It would be an idle proceeding,' this court said in *North Penn. Railroad v. Commercial Bank,* 123 U. S. 727, 733, 8 Sup. Ct. R. p. 266, 'to submit the evidence

to the jury when they could justly find only in one way' ": *Delaware, L. & W. R. Co. v. Converse,* 139 U. S. 469, 472, 11 S. Ct. 569, 570, per Harlan, J. (Emphasis supplied.) See also: *Eckenrode v. P. R. R.,* 335 U. S. 329, 69 S. Ct. 91 (1948); *Brady v. Southern Ry. Co.,* 320 U. S. 476, 64 S. Ct. 232 (1943).

In *O'Neill v. Reading Co.,* 306 F. 2d 204 (1962) the Third Circuit reversed solely because contributory negligence was submitted as a jury issue when it was not in the case. Here, contributory negligence should not have been posed for the consideration of the jury. Once instructed on contributory negligence, a jury is inevitably misled into looking for and finding it to exist when the facts are undisputed. Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores: *Co. Lit. 115b.*

C. Assumption of Risk.

Although the trial court erred in charging on contributory negligence, that error might well have been cured had the jury been instructed, as requested, that:

"A railroad employee does not assume the risks of his employment in any case where his injuries resulted in whole or in part from the negligence of the officers, agents or employees of the railroad." (R. 165, 999, 1000).

As heretofore stated, in our Reasons for Granting the Writ, *supra,* appellate courts have split three ways on the propriety of charging that assumption of risk is not an FELA defense. The court below held that the granting or giving of this charge is within the discretion of the trial judge. Now, whatever discretion a trial judge may have in other areas, he has none in charging the jury. He must instruct the jury on every point pertinent to the issues: *Douglass & Mandeville v. McAllister,* 7 U. S. 298, 3 Cranch 298, 2 L. Ed. 445 (1806); *Ranney v. Barlow,* 112 U. S. 207, 5 S. Ct. 104 (1884). What the court below really says is that the trial judge did not err in refusing to charge on

assumption of risk in this case even after railroad counsel improperly injected it into the case by his summation.

In this the court below joins those other courts which hold that the giving of an instruction on assumption of risk is *always* erroneous. The rationale of such decisions (e.g., *Texas & Pac. Ry. Co. v. Buckles*, 232 F. 2d 257, 261-2) find their authority in Mr. Justice Frankfurter's concurring opinion in *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54, 63 S. Ct. 444 (1943) to the effect that, because of its ambiguity, the phrase "assumption of risk" is an hazardous legal tool which is bound to create jury confusion. With respect, these courts fail to remember that the path to judicial confusion is often paved with concurring opinions and that the majority opinion in *Tiller* specifically warned against "recrudesence" of the term, assumption of risk, "under any other label in the common law lexicon" (*Tiller*, 318 U. S. at 67, 63 S. Ct. at 451).[5]

The inescapable conclusion to be drawn from a reading of those decisions which preclude or warn against instructing a jury on assumption of risk is that the courts are afraid that judicial confusion on the distinction between assumption of risk and contributory negligence will spill over to the confusion of the jury: See, *Dilley v. Chesapeake & Ohio Ry.*, 327 F. 2d 249, 253 (6th Cir. 1964) citing as authority the concurring opinion of Frankfurter, J., in *Tiller, supra.*

If there is puzzlement as to the distinction, it is because of the wrong turn American Law has taken in applying the ancient defense of "volenti non fit injuria" to the master-servant relationship and transmogrifying it into "scienti non fit injuria": See, *Thomas v. Quartermaine*, 18 Q. B. D. 685, 696 (1887). Whatever economic reasons there may have been for imputing "volens" when there was merely

5. Where assumption of risk is a complete defense as in non-FELA cases it is the duty of the court to instruct the jury as to such doctrine just as it was its duty to instruct on employer's obligation to furnish reasonably safe equipment: *Wong v. Swier*, 267 F. 2d 749 (9th Cir., 1959).

"sciens" to a workman, the doctrine as actually applied to the master-servant area is an aberration in negligence law. As remarked in *Harper and James, The Law of Torts,* Vol. 2, § 21.4, fn. 9, p. 1178 "the books are full of cases (outside the master-servant sphere) where a defendant has been negligent for failing to take some precaution to protect a plaintiff against a danger that plaintiff could have himself avoided if he had looked out for it."
See also: 3 *Labatt, Commentaries on the Law of Master and Servant,* §§ 893, 1181 (2d ed. 1913).

And, with respect, Congress in abolishing the defense by the FELA Amendment of 1939 (45 U. S. C. § 54) eventually accomplished through legislation what the British judiciary established in 1891 in *Smith v. Baker* [1891] A. C. 325. There the House of Lords held, at p. 362, that a mere continuance in service with knowledge of a risk, which may or may not result in injury, does not absolve the employer of liability if the risk was created or enhanced by the negligence of the employer; that an assumption of risk means actual consent or true "volens" to employer negligence. This very correct analysis can also be made by a Florida court. See, *Dana v. Bursey,* 169 So. 2d 845 (Fla. App. 1964).

Shimmering on the surface of the American doctrine of "scienti non fit injuria" is the hazard that, unless carefully instructed, juries will go one step further to equate "sciens" in an hazardous employment with prescience of the inevitability of injury. Known dangers of one's employment charge one with the duty of avoiding them: but knowledge does not charge one with the duty of anticipating the negligence of a fellow employee. The fellow servant rule once plugged that analytical hole: it too is a dead letter under the FELA (45 U. S. C. A. § 51).

A plea of contributory negligence, on the other hand, implies that the defendant could not have avoided the accident: *Doyle v. Kinahan* (1869) 17 W. R. 679 (Ir. Exc.). Consequently, the contributory negligence, if any, of the

plaintiff cannot begin until the danger created by defendant's negligence is operative. The question is not whether the plaintiff realized the danger but whether the facts he knew would have caused a reasonable person in his position to realize the danger: 28 *Halsbury's Laws of England,* 3rd ed., Negligence § 96, p. 92.

D. Summary.

Thus, on correct analysis, there was neither assumption of risk (of negligence) nor contributory negligence in the present case. The only risk assumed or consented to by Stager in boarding his engine when he did was the *possibility* of injury from a normal coupling. When the railroad argued knowledge of risk in Stager, it did so to create the inference that Stager had also consented to, or should have realized and anticipated, the *probability* of injury from an abnormal, negligent coupling.

We have demonstrated that the jury ought not to have been instructed on contributory negligence. When it was, it became mandatory that it also be instructed upon the distinction between assumption of risk and contributory negligence as applied to the undisputed facts of the case. The trial court's refusal to do so was gross error recreating for your petitioner the legal morass and confusion that existed pre-*Tiller.*

Point Two.

The Trial Court Abused Its Discretion to the Point of Denial of Due Process of Law and Invaded the Province of the Jury by Its Evidentiary Rulings on Testimony Respecting Petitioner's Disability.

The testimony in this case established that petitioner had been treated 28 times in the two-month period after the accident by a Florida osteopath, Dr. Meek (R. 700, 702); that from April 25, 1961, he had been under the care of Dr. Wycis, a Philadelphia neurologist (R. 635); and that he also came under the care of a Dr. Pollard (R. 803), a

Duluth, Minn., neurologist.[6] Each neurologist performed major surgery upon petitioner's back to remove herniated lumbar discs (R. 653, 803). Additionally, on June 8, 1962, petitioner was examined by a Florida neurologist, Dr. Perlmutter, pursuant to court order, and again on December 3, 1962, by the same doctor after the railroad had filed a motion to have Stager examined but before the court ordered such second examination (R. 916). Petitioner was examined also by three other doctors, but not treated by them.

Prior to the first trial of this matter, the trial court limited each party to two testifying doctors.[7] The limitation had the initially foreseeable (R. 884, 885), and later deliberate (R. 913), effect of precluding Stager from establishing the extent of his disability. This ruling was carried over into the second trial (R. 884, 885).

The limitation was arbitrary enough. It prevented a fair, complete, continuous narrative presentation of the plaintiff's post-accident medical course. But what was really appalling was the trial court's refusal to allow cross-examination of Dr. Perlmutter (the court-appointed physician) as to his evaluation of Stager's condition based on the December 3, 1962 examination when the doctor had admitted on direct that his disability evaluation based on the June, 1962 examination was "unfair to the patient [i.e., Stager]" because he could not truly then determine his condition as Stager had been operated upon only two months before (R. 914). The stated basis for the court's ruling was that because the later examination had anticipated but was not directly pursuant to court order, Dr. Perlmutter had thereby become a "treating" physician, and as such was subject to the two-doctor limitation.

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6. Stager worked summers on the Missabe Railway in Minnesota and winters in Florida. At the time of the accident and until just before the first trial his permanent home was in Duluth.

7. But made a revealing and startling exception by allowing the railroad's chief surgeon (R. 884, 885) to testify for either party, thus giving the defendant three medical witnesses. The trial court gave as its reason for the exception the thought that the railroad's doctor was "a competent doctor" (R. 885).

A. Limitation of Medical Testimony.

A trial judge must necessarily be given a wide discretion in the conduct of a trial. "The trial to which the parties are entitled is not an endless one or one unreasonably protracted and exhausting" (*Amoskeag Mfg. Co. v. Head,* 59 N. H. 332, per Doe, C. J.) and there may be evidence having a slight probative effect, but so unimportant compared with other better evidence easily available as to be properly excluded; *Jones, Commentaries on the Law of Evidence* (2nd ed.) 1093-1095. Procedural rules such as Florida Rule of Civil Procedure 1.16 (4) are not, therefore, per se a denial of due process. The appellate court below conceded that abuse of judicial discretion can amount to a denial of due process of law but the majority did not, or would not, see abuse of discretion in the case at bar.

The trial court initially limited medical testimony to two testifying doctors for each side prior to the first trial of this case. The limitation was modified at the first trial to allow either side to produce the railroad's chief surgeon, Dr. Lockwood (R. 884) as its third medical witness. The record clearly demonstrates that this same restriction was continued into the second trial (R. 884, 885, 913, 914).[8]

Yet the court below held that absent a proffer on record as to what petitioner sought to elicit from the medical witnesses blocked from testifying, it was impossible to determine whether the trial court had erred. With respect, this is putting the cart before the horse. The record is clear that plaintiff's doctors, Dr. Meek and Dr. Keedy, were under subpoena (R. 885) and that Dr. Meek had been the treating doctor for about two months immediately after the accident (R. 700, 702). We submit that the right to produce testimony is constitutionally guaranteed and that the judicial discretion to preclude it must be justified. Here, the record is barren of any rational justification for the trial court's ukase. When the trial court was asked by

8. Neither the limitation at the first trial nor its continuation in the second trial was pursuant to any recognized pre-trial procedure. There was no pre-trial (R. 886).

petitioner's counsel whether the court had again restricted each side to two doctors, the reply was an abrupt "I sure have" (R. 884). To have proffered Dr. Meek's and Dr. Keedy's testimony after this ruling, petitioner's counsel would have invited a threatened citation for contempt of court (R. 206, 207).

The appellate court below when faced with a sworn proffer of the testimony petitioner sought to elicit from the court-appointed doctor stubbornly rejected the proffered testimony as "cumulative"! And this though he had been called by the railroad as its witness and wore the laurels of court appointment so far as the jury was concerned! But out of the hearing of the jury the court ruled that Dr. Perlmutter had lost his status of court appointee and had become a "treating physician" because Stager had been examined by him on December 3, 1962 in anticipation of, but without, a further court order!!

But gasps at such Kafka-esque reasoning are not a substitute for legal argument. The true rule, set forth concisely in 31 C. J. S., Evidence § 159, p. 868 ,is that the discretion of a trial judge in limiting evidence must be exercised *without prejudice* to the litigant and cannot be exercised to reject *material* evidence. Plainly, petitioner was prejudiced. Plainly, the evidence excluded was material. See also, *Model Code of Evidence,* American Law Institute, Rule 105.

At the very least, we contend, petitioner should have been allowed to present the testimony of Dr. Meek. His testimony would have bridged the medical gap between the date of the accident and the commencement of Dr. Wycis' treatment some two months later. Necessarily, petitioner's counsel, by virtue of the two doctor limitation, was faced with the invidious choice of determining which portion of petitioner's post-accident medical history he must drop and lose. The case lost its continuity. Logical sequence would have firmly established the cause and effect of this accident and the sequellant injury. He should never have been faced with such a choice. When he was, petitioner was

deprived of due process of law, and the province of the jury was ruthlessly diminished. The limitation made a farce out of petitioner's presentation of testimony on the issue of damages.

B. Restriction of Dr. Perlmutter's Cross-Examination to the Scope of Defense Chosen Direct.

Not content with farce, railroad counsel deployed an obvious talent for the manipulation of courtroom procedure to essay the grotesque. Amazingly (if not sinisterly), he achieved it.

His method was simplicity itself. He called Dr. Perlmutter as a railroad witness; established him through the mouth of the court as the court-appointed doctor (R. 897, 898) and confined his direct examination of the doctor to the *first* examination of June 8, 1962. Then, even though the doctor on cross-examination testified that his preliminary evaluation of Stager's disability after the June examination was unfair, being too close to Stager's second back operation (R. 914), railroad counsel objected to any cross-examination as to the doctor's later evaluation based upon the December, 1962 examination as being beyond the scope of the direct (R. 912, 914). The objection was sustained! Petitioner's counsel was instructed by the court that he had already used up his quota of two medical witnesses. He could neither cross-examine Dr. Perlmutter as to disability evaluations subsequent to June, 1962, nor call Dr. Perlmutter to make him his witness for this purpose (R. 913, lines 16, 17, 18). Petitioner's counsel then tendered, out of the hearing of the jury, a sworn proffer of the doctor's *final* evaluation that Stager's disability was permanent (R. 916) and that such disability was caused by the accident (R. 910, 911). Railroad counsel objected to the proffer. Shockingly, the objection was sustained (R. 917), with the result that jury was deprived of this crucially important and critical information from a railroad witness haloed by the (temporary) status of *court* appointment.

In the preceding sub-point the court below's bland acceptance of this astounding piece of legal legerdermain has been partially noted. The court below went on to accept in toto the railroad's theory that the cross-examination was correctly confined to the direct. This is neither good sense nor good law.

"The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth": *Funk v. United States,* 290 U. S. 371, 381, 54 S. Ct. 212, 215 (1933), per Mr. Justice Sutherland. The right to cross-examination, is, subject to the discretion of the trial judge, constitutionally protected and any unreasonable abridgement thereof is prejudicial error: *Alford v. U. S.,* 282 U. S. 687, 51 S. Ct. 218 (1931).

Until 1821, the English or Orthodox rule permitting unlimited cross-examination on all material issues prevailed in this nation. In that year, the great Chief Justice Gibson of Pennsylvania, aghast at a bizarre performance by plaintiff's counsel in calling the defendant for cross-examination before the opening speech, incautiously enunciated the doctrine that, in the interest of an orderly trial, cross-examination be confined to the direct. Your Court followed suit in 1829 and the doctrine has become endemic in most American jurisdictions despite a later partial recantation by its originator: See, *Conley v. Mervis,* 324 Pa. 577, 188 Atl. 350, 108 ALR 160 (1936); 58 Am. Jur., Witnesses, § 629.

Because order is no synonym for justice, the doctrine has been riddled with exceptions. Pennsylvania itself has decided that where justice requires it, the rule must be disregarded by the trial court: *Conley v. Mervis, supra.* Federal courts have adapted a similar view despite the history of F. R. C. P. Rule 43(b): *Alford v. U. S., supra; Union Automobile Indemnity Ins. Co. v. Capitol Indemnity Ins. Co.,* 310 F. 2d 318, 321 (7th Cir. 1962); *Butler v. New York Central R. R. Co.,* 253 F. 2d 281 (7th Cir. 1958); *Maryland Casualty Co. v. Hallatt,* 326 F. 2d 275, 277, n. 3 (5th Cir. 1964).

To be sure, no problem would have arisen had the trial court belatedly deviated from its unfair restriction upon petitioner's medical testimony and allowed the good doctor to become petitioner's witness. Nevertheless, the point is important in jurisdictions such as Florida where the doctrine confining cross-examination to the scope of the direct is rigorously applied.

But petitioner does not come before the bar of this Court to assert the rights of Floridian litigants. He comes as one who has been deprived of a *federal* right by a quirk of state procedure. It is a commonplace that "whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice": *Davis v. Wechsler,* 263 U. S. 22, 24, 44 S. Ct. 13, 14, per Holmes, J.

When petitioner elected to assert his FELA right in a Florida court, the state merely provided a procedural framework for adjudicating the substantive federal question. But the paramount interest was federal: *Dice v. Akron, C. & Y. R. Co.,* 342 U. S. 359, 72 S. Ct. 312 (1952). The state has a "substantial interest in exacting compliance with [its] procedural rules" but that state interest yields, when a federal right is asserted, to an ideal, the ideal of fair procedure: *Fay v. Noia,* 372 U. S. 391, 431, 83 S. Ct. 822, 845 (1963).

The right to a trial by jury in which fair and reasonable rulings as to the admission of evidence is afforded is too substantial a part of the rights accorded by the FELA to permit it to be classified as a mere local rule of procedure: *Dice v. Akron, etc., R. Co., supra;* see also, *Brown v. Western Rly. of Alabama,* 338 U. S. 294, 70 S. Ct. 105; *Carter v. Texas,* 177 U. S. 442, 20 S. Ct. 687; *Staub v. Baxley,* 355 U. S. 313, 78 S. Ct. 277; *Whitus v. Balkom,* 333 F. 2d 496, 505 (5th Cir. 1964). We say that Stager's right to a jury trial was negated when the "pernickitiness"[9] of

9. Frankfurter, J.'s description in *Brown v. Western Rly. of Alabama,* at 338 U. S. 303, 70 S. Ct. 110.

local procedure prevented the jury from hearing the *whole* truth and a witness from hewing to his solemn oath to tell it.

We suspect that Florida would not deal quite so harshly if the claim had been made under state law. We would hope that in such a situation it would follow the just majority rule which allows proper cross-examination "to bring out matters tending to qualify, modify or explain the [doctor's] testimony on direct": *Albaugh v. P. R. R.*, 120 F. Supp. 70, aff'd 219 F. 2d 764 (1954); *Bank v. Fordyce*, 9 Pa. 275, 49 Am. Dec. 561; *Conley v. Mervis, supra;* 4 *Wigmore on Evidence* § 1889; Annotation, 108 ALR 167, 168. See also, *Copes v. United States*, 345 F. 2d 723, 724, note 2 (D. C. Cir. 1964).

Absent the opportunity to cross-examine to the extent that all matters in issue be divulged, petitioner was denied due process of law and the trial court invaded the province of the jury to hear relevant, material evidence. Due process in a trial can be affected in many ways. Only last term, this Court reversed and granted a new trial where television cameras were erected in a trial setting because of the subtle prejudice engendered thereby: *Estes v. U. S.*, No. 286, S. Ct., October Term, 1964. Tricky evidentiary rulings deal, not subtle, but devastating blows to the ideal of a fair trial when their effect is to conceal or obfuscate the truth.

CONCLUSION.

WHEREFORE, Petitioner urges the grant of this petition, not just that justice be done in his case, but that the law may be more truly ascertainable in all cases such as his.

Respectfully submitted,

B. NATHANIEL RICHTER,
JOHN A. MCMENAMIN,
FRATES, FAY & FLOYD,

Appendix.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

IN THE

District Court of Appeal of Florida

THIRD DISTRICT.

January Term, A. D. 1964.

Case No. 63-346.

EARL L. STAGER,

Appellant,

v.

FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,

Appellee.

Opinion filed April 7, 1964.

An Appeal from the Circuit Court for Dade County, J. Fritz Gordon, Judge.

Frates, Fay & Floyd, for appellant;

Bolles, Prunty, Martin & Goodwin and Kenneth L. Ryskamp, for appellee.

Before BARKDULL, C. J., and TILLMAN PEARSON and HENDRY, JJ.

BARKDULL, Chief Judge.

Appellant, plaintiff in the trial court, appeals from a favorable final judgment in an F. E. L. A. action against

the appellee, wherein and whereby he secured a verdict in the sum of $15,000.00. In and by his complaint, the appellant sought damages for an injury allegedly sustained while lawfully engaged in his occupation as an engineer on the railroad, which injury occurred because of an unnecessary jar or jolt to the car or cab in which he was riding, occasioned because of the failure of a fellow employee to give an appropriate signal. The alleged injury was to the plaintiff's lower back. Between the date of the injury and the trial, the plaintiff underwent several operations by two doctors and was examined by several other doctors of his own choosing and by a court-appointed physician. The appellant has preserved the following points for review, upon which he contends the trial judge erred in the conduct of the proceedings, entitling him to a new trial, to wit:

1. That the court erred in limiting the number of doctors who could testify.

2. That the court erred in refusing to permit into evidence a letter allegedly containing certain admissions against interest.

3. That the court erred in refusing to direct a verdict for the plaintiff on the issues of contributory negligence.

4. That the court erred in refusing to instruct the jury that the defense of assumption of risk is not available in an F. E. L. A. case.

5. That the court erred in instructing the jury that any damages awarded were not subject to Federal Income Tax.

6. That the court erred in charging the jury on proximate cause.

7. A cumulative point that the acts of the trial judge, above enumerated, denied the plaintiff due process of law.

As to the first point [limiting the medical testimony to two doctors, pursuant to Rule 1.16(4) F. R. C. P.], a

trial judge is charged with the conduct of a trial and only such conduct on the part of the trial judge as would result in an abuse of discretion, depriving a party of due process of law, would warrant an appellate court directing a trial judge as to the manner of conducting his courtroom. See: Rose v. Yuille, Fla. 1956, 88 So. 2d 318; H. I. Holding Company v. Dade County, Fla. App. 1961, 129 So. 2d 693; 32 Fla. Jur., Trial, § 16; 35 Fla. Jur. Witnesses, § 154. The limiting number of witnesses for a given side has long been recognized as appropriate. See: Southern Pacific v. Marquez, 9th Cir. 1930, 44 F. 2d 286; Montrose Contracting Co. v. Westchester County, 2nd Cir. 1938, 94 F. 2d 580; Redondo Beach School District v. Flodine, 1957, 153 C. A. 2, 437, 314 P. 2d 581; Swope v. City of Seattle, 1904, 36 Wash. 113, 78 P. 607; Rule 1.16(4), F. R. C. P. With the exception of the court-appointed physician [whose testimony will be commented on later], the plaintiff failed to proffer what evidence he would have sought to elicit from the witnesses he was prevented from calling and, without such a proffer in the record, it is impossible for an appellate court to determine whether the refusal to permit the additional witnesses constituted error. See: Green v. Hood, Fla. App. 1960, 120 So. 2d 223; Musachia v. Terry, Fla. App. 1962, 140 So. 2d 605; Seaboard Air Line Railroad Company v. Ellis, Fla. App. 1962, 143 So. 2d 550. As to the court-appointed physician, this cause was before the trial court on two occasions. The first trial resulted in a mistrial. Prior to the first trial, the judge announced his two-witness limitation as to medical evidence. Also prior to the first trial a court-appointed physician had been appointed and had examined the plaintiff. During the interval between the first and second trials, the plaintiff visited the court-appointed physician [not pursuant to any court order or agreement of counsel] and was treated by said doctor. Upon the second trial, the trial judge concluded that to permit evidence of the subsequent examination by the court-appointed physician [which examination was in the

nature of that of a treating physician] would violate his previous admonition that only two medical witnesses would be permitted. No error in excluding the doctor's testimony on this ground has been made to appear. What he would have testified to was proffered in the evidence and its effect was that the plaintiff was unable to continue in the occupation of a railroad engineer. However, this evidence would merely have been cumulative to that testified to by the two treating physicians. Lastly, the appellant urges that he was entitled to cross-examine the court-appointed physician because, on direct examination, said physician was asked questions concerning his examination during the visit between the two trials. An isolated reading of one question may indicate such a question on direct examination. However, a full reading of the direct testimony and a full reading of the questions propounded on direct examination indicates that the court-appointed physician was examined only as to results of the examination which he conducted pursuant to the court order. Therefore, there is no merit found in the contention that plaintiff's counsel was not permitted to cross-examine.

As to the second point, the letter in question reads, in pertinent parts, as follows:

> "For your responsibility in connection with your failure to be in proper position and pass signals when making movement on to Track No. 2 with a cut of cars * * * resulting in rough coupling and personal injuries being sustained by [Plaintiff] while working as switchman * * * your service record is being assessed with thirty demerits."

At the time of the trial, the offending fellow employee testified that he failed to give the appropriate signal. With this direct testimony in the record, that part of the letter which might have tended to prove these elements would merely have been cumulative and the conclusions of the writer [evidenced by the remaining allegations of the let-

ter] obviously were conclusions drawn from hearsay statements given to him and, therefore, were not appropriate to be considered by the jury.

As to the third point, no error has been demonstrated in failing to direct a verdict for the plaintiff when the record is examined in light of the following authorities: Davis v. Florida East Coast Railway Company, Fla. App. 1962, 138 So. 2d 97; Lehigh Valley R. Co. v. Normile, 2 Cir. 1918, 254 F. 680; La Mere v. Railway Transfer Co., 125 Minn. 159, 145 N. W. 1068; Salisbury v. New York Central R. Co., 220 App. Div. 491, 222 N. Y. S. 38. These decisions clearly indicate that when one who knows of an obvious condition which could result in sudden stops or jerks fails to brace himself, he may be guilty of negligence.

As to the fourth point, no error is demonstrated in failing to permit a charge on assumption of risk, in that this defense was not plead by the railroad and, generally, the granting or giving of this charge is within the discretion of the trial judge. See: Abernathy v. St. Louis-San Francisco Railroad Co., Mo. Sup. 1951, 237 S. W. 2d 161; Reid v. Terminal Railroad Assn. of St. Louis, Mo. App. 1957, 306 S. W. 2d 630; Kiger v. Terminal Railroad Assn. of St. Louis, Mo. Sup. 1958, 311 S. W. 2d 5.

As to the fifth point, relative to the Federal Income Tax question, this contention has been answered adversely to the appellant by the decision of the Second District Court of Appeal, cited as: Poirier v. Shireman, Fla. App. 1961, 129 So. 2d 439.

As to the sixth point, the charge as to proximate cause when to damage and not injury, no error is demonstrated in the giving of this charge in light of the principles announced in the following: Chomont v. Ward, Fla. 1958, 103 So. 2d 635; 9 Fla. Jour., Damages, § 12.

Lastly, the seventh point contends that the cumulation of errors, above discussed, on the part of the trial judge

denied the plaintiff due process of law. It was candidly conceded by counsel for plaintiff during oral argument in this case [if not in his brief] that the jury's verdict on the evidence presented to it was not inadequate. In other words, it was an adequate verdict upon the evidence presented to it.

Having concluded that the trial judge committed no error in excluding the evidence referred to in Points 1 and 2, the 7th point relying for reversal on the cumulative effect on the errors alleged in the first 6 [and we have by this opinion disposed, as to the first 6 points, adversely to the appellant] then, of necessity, the seventh point must fail.

The record in this case consists of approximately 1,100 pages, some 600 of which constitute the trial transcript. Following a review of this record in its entirety, it is apparent that the plaintiff received a fair trial and a verdict which is supported by the evidence. Even though it is apparent that the verdict might have exceeded that awarded by the jury, this conclusion alone does not warrant the granting of a new trial. Generally, in order to be entitled to a new trial, it is incumbent upon an appellant [particularly when he received a favorable verdict in the trial court] to demonstrate error on the part of the trial judge, but for which he would have received an increased verdict from the jury. An examination of this record fails to indicate any such action on the part of the trial judge in this cause. Therefore, the final judgment here under review is hereby affirmed.

Affirmed.

HENDRY, *Judge,* dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1965.

CASE No. 33,556.

EARL L. STAGER,

Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
A FLORIDA CORPORATION,

Respondent.

Opinion filed April 28, 1965.

Writ of Certiorari to the District Court of Appeal, Third District.

Frates, Fay & Floyd, for Petitioner;

Bolles, Prunty, Martin & Goodwin, for Respondent.

PER CURIAM.

By petition for a writ of certiorari we are requested to review a decision of the Court of Appeal, Third District, because of alleged conflicts with prior decisions of this Court and other District Courts. Stager v. Florida East Coast Railway Company, 163 So. 2d 15.

We have thoroughly examined the record and briefs, and have heard oral arguments. This careful consideration of the matter has led us to conclude that the petitioner has failed to demonstrate any conflict of decisions sufficient to activate the jurisdiction of this Court.

The writ was improvidently issued, so it is therefore discharged.

It is so ordered.

DREW, *C. J.*, THOMAS, ROBERTS, THORNAL and O'CONNELL, *JJ.*, concur.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 392

EARL L. STAGER,

Petitioner,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,
a Florida corporation,

Respondent.

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1965

No. 392

EARL L. STAGER,

Petitioner,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,
a Florida corporation,

Respondent.

BRIEF IN OPPOSITION

THE FLORIDA EAST COAST RAILWAY COMPANY, by its attorneys, Bolles, Goodwin & Ryskamp, Esquires, hereby submits its brief in opposition to the petition for Writ of Certiorari, herein filed, seeking a review of the order of the District Court of Appeal of Florida, Third District dated April 7, 1964, or the order of the Supreme Court of Florida dated April 28, 1965, discharging a Writ of Certiorari as improvidently issued.

OPINIONS BELOW

The petitioner has made proper reference to the opinions of the Florida courts in the petition herein filed. The respondent takes exception to the reference by the

petitioner that the $15,000 jury award was "miniscule" and the uncomplimentary references by the petitioner of the trial rulings. In this regard, it must be noted that the petitioner previously has never contended that the jury verdict was inadequate. As noted in the opinion of the district court:

> "It was candidly conceded by counsel for plaintiff during oral argument in this case [if not in his brief] that the jury's verdict on the evidence presented to it was not inadequate."

Petitioner is raising the inadequacy of the verdict for the first time in the petition presented to this Court.

JURISDICTION

Respondent shares the opinion of the petitioner that the decision under review is that of the District Court of Appeal, Third District. The statutory basis, relied upon by the petitioner, finds support neither from the record nor from the decision below. 28 U.S.C. § 1257(3) provides certiorari review of state courts upon three grounds. Allegedly petitioner is relying upon the first and third ground.

The first ground creates jurisdiction ". . . where the validity of a . . . statute of the United States is drawn into question . . ." The petitioner has made no claim that the "validity" of the Federal Employer's Liability Act [45 U.S.C. § 51, et seq.] was questioned but has conceded that this cause involves only the "construction" of a federal statute.

The second ground creates jurisdiction when" . . . a right or privilege is claimed under the Constitution of the United States." The petitioner failed to raise any question of an infringement of Constitutional rights in the state courts thus precluding the jurisdictional basis for raising the question on this Court.

QUESTIONS PRESENTED

1. In this suit under the Federal Employer's Liability Act, where the respondent never raised the defense of assumption of risk, where no mention was made by the respondent of assumption of risk, where the evidence supported a jury finding that the petitioner failed to exercise reasonable care for his own safety, the trial court did not err in refusing to charge the jury that assumption of risk is no defense and in charging the jury that contributory negligence was no bar to petitioner's claim but served to reduce his damages.

2. The petitioner was not denied the right of jury trial or due process of law by rulings of the trial judge which limited the number of expert witnesses and restricted cross-examination to the scope of direct examination.

STATUTE INVOLVED

Respondent contends the only federal statute involved in this cause is 45 U.S.C. § 54, which was properly applied by the trial court in denying the petitioner's requested jury charge on assumption of risk. The Florida

courts never placed the validity of this statute in question. This statute is set forth in full in the petition for Writ of Certiorari.

Respondent denies the necessity for any reference to 45 U.S.C. § 51, Amendment VII and Amendment XIV of the United States Constitution.

STATEMENT OF THE CASE

This is a case wherein the jury found liability under the Federal Employer's Liability Act. No useful purpose would be served by analyzing facts other than those which are directly related to the questions raised by the petition.

At the outset, it is important to note that the petitioner has failed to comply with Supreme Court Rule 23(f), which provides, inter alia:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's

charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so at to give this court jurisdiction to review the judgment on writ of certiorari."

In this regard the respondent submits that the petitioner never raised any question in the state courts relating to a violation of Amendment VII and XIV of the United States Constitution. The record further fails to reflect any objection by the petitioner to the "two-doctor rule" until after the verdict proved to be unsatisfactory.

The petitioner must contest certain contentions of the petitioner which are set forth in the Statement of he Case. The respondent never admitted that the special damages were $20,000. Petitioner's reference to pages 1078, 1079 of the record do not bear out this so-called admission, but, to the contrary, clearly demonstrate the conflict on the damage question. The medical bills of $2,750 were disputed by the respondent on the ground that some of the medical expense pertained to an injury not related to the petitioner's employment (R 1078-1079, 830-832). As a matter of fact, the respondent contended, and the jury may have so found, that petitioner's operations were not the result of the incident upon which this suit is based (R 669-671). The respondent disputed the claimed wage loss of $17,200 as there was ample evidence in the record, which a jury could believe, that the petitioner was able to go back to work but refused to do so (R 1078, 829, 813, 659-661).

The foregoing discussion is necessary to demonstrate the erroneous conclusions of the petitioner (Petition, p.

6) that the jury either found that Stager was not permanently disabled or that Stager was guilty of contributory negligence. Stager's own doctor rated his disability between 6% and 15% (R 825). Not one doctor said that the petitioner was incapable of doing any work again. Petitioner's attempted verdict analysis is interesting but, when the record is reviewed in the light most favorable to the respondent, it is apparent that the jury could have found no contributory negligence and awarded Stager for his pain and suffering and some medical expense, but rejecting the total wage loss claimed and some of the medical.

The foregoing clearly demonstrates the impropriety of this case in this Court. This is simply a case where a claimant under the F.E.L.A. failed to get an award as large as he expected. In order to activate this Court's jurisdiction, the petitioner has concocted his own private theory of what the jury verdict represents. If petitioner is allowed to make his own record, the jurisdictional aspects of this case are limitless. When the record is reviewed in true prespective, there is no basis for this Court's jurisdiction.

ARGUMENT

Point One

Trial Court Properly Charged on Contributory Negligence and Properly Refused to Charge that Assumption of Risk was no Defense.

As previously noted, this is simply a case wherein the petitioner did not receive as large a verdict as he ex-

pected. The $15,000 verdict was certainly a substantial one for an injury which left the petitioner with a permanent disability of between 6% and 15%. Furthermore, the petitioner never claimed the verdict was inadequate prior to the filing of the petition in this Court.

A. Contributory Negligence

Petitioner's whole argument seems to be based upon the fact that there was no rule which prevented the petitioner from boarding the train while the yard crew was still engaged in switching operations. Although there was no rule preventing such conduct by the petitioner, the petitioner's supervisor testified that engineers learn, as a matter of experience, not to board a train until it is completed by the yard crew (R 787, 789):

> "Q Let us go back a minute on the question about rules that are not written, the rules of procedure that are learned by experience.
>
> Tell the jury, if you will, please, what the rule is as pertains to the arrival of an engineer on call and then when he is to take over the control of the engine.
>
> * * * *
>
> A The procedures are that the crews will not take charge of the train or the engines until the trains are completed.
>
> Q When you say 'the crews', which crews are you talking about?
> A The road crews, outbound crew.

Q Is Mr. Stager on the road crew?
A Yes, sir.

Q You say not until the train is completed. What do you mean by completed?
A Until the train is made solid and engines placed on the train."

The test in determining whether the petitioner was guilty of contributory negligence is whether he used reasonable care under the circumstances presented. The jury may have found that an experienced engineer would not have boarded an engine until the train was completed and "made solid." The petitioner had no control over the switching operations and therefore any movements would be unexpected. Under these circumstances he should have braced himself for unexpected jerks and jolts. Although the petitioner testified that he did brace, the jury may have disbelieved this testimony since the fireman, who was also on the engine, was not injured by the switching operation.

The courts have long recognized that a failure to brace, under circumstances wherein sudden stops or jerks may be expected, may constitute contributory negligence on the part of an employee. **Davis v. Florida East Coast Railway Company**, Fla. App. 1962, 138 So.2d 97; **Lehigh Valley R. Co. v. Normile**, 2 Cir. 1918, 254 F. 680; **La Mere v. Railway Transfer Co.**, 125 Minn. 159, 145 N.W. 1068; **Salisbury v. New York Central R. Co.**, 220 App. Div. 491, 222 N.Y.S. 38.

It must be further noted that there is nothing in the record to support a conclusion that the jury found

any contributory negligence on the part of petitioner. Since the jury did not return a special verdict, and since petitioner has conceded that this verdict is not inadequate, it appears that petitioner received full compensation from the jury for his injuries.

B. Assumption of Risk

Despite the protestations of the petitioner to the contrary, the sum and substance of all reported decisions which have considered the question of a negative charge on assumption of risk is that the giving of such a charge is within the discretion of the court. Ordinarily, courts do not charge the jury on legal issues which do not apply to the case under consideration. Of course an exception would exist were the issue injected into the case by the pleadings or otherwise, but such is not the case herein.

The petitioner acts under the assumption that the average juror is thoroughly conversant with the legal doctrine of assumption of risk and, in F.E.L.A. cases, there is a need to expunge this legal information from their consideration. Nothwithstanding the fallacy of such a premise, the petitioner completely ignores the warning of Justice Frankfurter in **Tiller v. Atlantic Coast Line R. Co.**, 318 U.S. 54, 87 L.Ed. 610, 63 S. Ct. 44, as follows:

> "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be disregarded."

Petitioner places great reliance on the decision of the Third Circuit in **Koshorek v. Pennsylvania Railroad**

Company, 318 F.2d 864 (3rd Cir. 1963). Respondent will not refute the argument of the majority, which seems to be the minority rule, but will refer the Court to the cogent dissent of Judge Ganey (318 F.2d 371) which clearly gives warning of the erroneous course set by the majority.

The basic issue in this case is whether the respondent furnished the petitioner with a safe place to work. The Court properly charged the jury on the duty of the employer under the F.E.L.A. Obviously, the jury found that a safe place to work was not furnished and awarded the petitioner $15,000 in damages. Despite the petitioner's contentions to the contrary, the jury resolved a simple issue under an appropriate charge from the trial court. There is no basis for further review by this Court.

Point Two

The Trial Court Did Not Abuse Its Discretion in Ruling Upon Evidentiary Questions

Rule 1.16(4), Florida Rules of Civil Procedure, authorizes the trial court to limit the number of expert witnesses. The trial judge held that each side would be limited to two medical witnesses. Nowhere in the record is there any indication that the petitioner objected to such a procedure. On appeal, the petitioner tested the discretion of the trial court in the District Court of Appeal, Third District, which found no abuse of discretion. The district court noted that the limitation of expert witnesses has been recognized under Rule 16, Federal Rules of Civil Procedure; Southern Pacific v. Marquez, 44 F.2d 286 (9th Cir., 1930) and Montrose Contracting Co. v. Westchester County, 94 F.2d 580 (2nd Cir., 1938).

The trial court recognized the petitioner's penchant for "doctor shopping" and refused to permit every doctor to testify. Only after the jury returned a verdict that did not please the petitioner did this ruling become significant.

Wtih regard to the limitation on Dr. Perlmutter's testimony, the petitioner fails to mention the factual background for this ruling. This cause was partially tried on an earlier occasion but resulted in a mistrial. This mistrial was provoked by petitioner's counsel who was fined $500 by the trial court (R 98). At the time of the first trial, Dr. Perlmutter had examined the petitioner pursuant to an order of the court. During the interim between the first trial and the second trial, petitioner was reexamined by Dr. Perlmutter. This second examination was not pursuant to court order.

At the second trial, the trial court limited the examination of Dr. Perlmutter to the scope of the direct examination of the respondent. Dr. Perlmutter testified regarding the only examination he made as a court-appointed physician. The jury heard the same testimony that the jury at the first trial heard. Any contrary ruling by the trial court would permit petitioner to take advantage of the mistrial which was provoked by his counsel.

The district court considered the petitioner's contentions and properly found no reversible error:

> "As to the court-appointed physician, this cause was before the trial court on two occasions. The first trial resulted in a mistrial. Prior to the first trial, the judge announced his two-witness

limitation as to medical evidence. Also prior to the first trial a court-appointed physician had been appointed and had examined the plaintiff. During the interval between the first and second trials, the plaintiff visited the court-appointed physician (not pursuant to any court order or agreement of counsel) and was treated by said doctor. Upon the second trial, the trial judge concluded that to permit evidence of the subsequent examination by the court-appointed physician (which examination was in the nature of that of a treating physician) would violate his previous admonition that only two medical witnesses would be permitted. No error in excluding the doctor's testimony on this ground has been made to appear. What he would have testified to was proffered in the evidence and its effect was that the plaintiff was unable to continue in the occupation of a railroad engineer. However, this evidence would merely have been cumulative to that testified to by the two treating physicians."

It is evident from the foregoing that the petitioner received a fair trial which safeguarded all his Constitutional rights.

CONCLUSION

This case presents nothing more than dissatisfaction by the petitioner on the size of the verdict received from the jury. The jury was properly charged on the law and was permitted to consider all pertinent and admissible evidence. There is no basis for this Court's jurisdiction after the full and complete review given by the state courts.

Respectfully submitted,

GEORGE C. BOLLES,
KENNETH L. RYSKAMP

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 392.

EARL L. STAGER,

Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
A Florida Corporation,

Respondent.

REPLY TO BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 392.

EARL L. STAGER,

Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
A FLORIDA CORPORATION,

Respondent.

REPLY BRIEF IN OPPOSITION.

The indirection and non-responsiveness of respondent's opposition brief forces this reply to the new matter therein contained, respecting claims that

(1) petitioner raises inadequacy of verdict for the first time here;

(2) petitioner's counsel "provoked" a mistrial and was therefore confined to testimony produced at the first trial;

(3) alleged record testimony on "experience" of road crews proved contributory negligence;

(4) the jury could have believed that petitioner was not disabled from the testimony of his own doctor.

(1) Inadequacy of Verdict.

It is time enough to speak of inadequate verdicts when one has had a fair trial. Petitioner has not raised the issue here or below. Not until petitioner is afforded due process of law, in the presentation of evidence, in testing that of the defense, and by appropriate jury instruction on the evidence, will we have a true evaluation of petitioner's financial losses.

(2) Petitioner "Provoking" Mistrial.

The brief in opposition (p. 11) advances the extraordinary contention that, after a mistrial, the petitioner is foreclosed from placing before the jury legitimate, material proof of the course of his medical history thereafter.

Respondent's contention is all the more extraordinary in that it rashly exposes yet another shabby aspect of the respondent's trial technique in glaring disregard for due process and fair play.

The "factual background" of the mistrial declared at the earlier trial was this. The negligent crewman whose failure to relay signals resulted in a "rough coupling and personal injuries" to petitioner was assessed, after railroad inquiry, with 30 demerits (R. 534-536). A railroader on respondent's line who accumulates 90 demerits is subject to discharge (R. 536-537). At both trials the trial court refused to allow respondent's letter assessing the demerits into evidence as an admission of respondent (R. 540). Though preserved in the appellate court below (vide majority opinion of the Third District Court of Appeal) this issue was not presented to this Court because it went to the existence of negligence and the jury found respondent negligent. Therefore, though petitioner was improperly deprived of an important item of proof, the verdict for the plaintiff rendered it technically moot, although it may well have had an effect on the size of the verdict: *Katila v. B. & O. R. R.*, 104 F. 2d 842, 843 (6th Cir. 1939); *Sears v. So. Pac. Co.*, 313 F. 2d 498, 502 (9th Cir. 1963); *Chicago, etc., Ry. Co. v. Kulp*, 102 F. 2d 352, 356 (1939); *Dennis v. Denver, etc., Ry. Co.*, 375 U. S. 208, 84 S. Ct. 291 (1964); *Mercer v. Theriot*, 377 U. S. 152, 84 S. Ct. 1157 (1965).

The first trial ended during the cross-examination of Hurley, the respondent's coupling foreman (R. 96, 97, 98). Hurley denied that there had been an accident. Petitioner's counsel countered that denial by asking Hurley whether or not the demerit letter referred to an accident. A mistrial

was then declared and petitioner's counsel engaged in a legitimate search for truth was fined $500.00.

Even if the demerit letter was not an admission that respondent's servant was at fault, it was surely usable to impeach Hurley. Hurley was the switching crewman whose signals were not relayed. The demerits would not have been assessed had there been no signals to be relayed. Hurley was the only person who knew that he had given signals and the only person who could, at the official railroad investigation, have informed the respondent that he had done so. Yet the trial court immediately declared a mistrial and penalized petitioner's counsel. Significantly, Hurley was not produced in person by respondent at the second trial. Cf.: *Gori v. U. S.*, 367 U. S. at 369-70, 81 S. Ct. at 1526-7.

We leave it to this Court to judge whether petitioner "provoked" a mistrial, although we do not see the materiality of this point relative to the merits of the petition. Counsel for petitioner was merely preserving the error on the record. Seemingly, the Court should consider whether the mistrial was "invoked" when petitioner's cross-examination of Hurley got too close to the bone.

While on respondent's Point Two, petitioner asks what on earth has "doctor shopping" to do with the second examination by a neutral physician appointed by the court itself?

(3) Railroaders "Experience" as Contributory Negligence.

Respondent suggests that petitioner's "whole argument" is based upon the fact that there was no rule which prevented the petitioner from boarding the train while the yard crew was engaged in switching operations" (Brief in Opposition, p. 7). Petitioner's "whole argument", rather, is that the respondent had the burden of proving contributory negligence; that it failed to prove it; and that the trial court, nevertheless, charged the jury on that unsubstantiated issue; and dismissed petitioner's demurrer on the issue of contributory negligence.

Respondent again rashly indulges in presentation of one error as a cure for another. Footnote 4 to the petition (p. 14) noted that the arbitrary action of the trial court in preventing petitioner from adducing testimony to the effect that it was customary for road crews to board incomplete trains while allowing respondent to attempt such production. Quite unabashed, respondent trots out this arbitrarily admitted evidence as proof of contributory negligence. It seems to think that the truncated excerpt from the record (R. 789), proves that railroad "engineers learn, as a matter of experience, not to board a train until it is completed by the yard crew". We fear the excerpt proves no such thing. The only mention of "experience" is in the question asked by respondent's counsel. The answer was completely non-responsive. The witness, respondent's foreman of engines and trainmaster (Mr. Robert Stack, or "Bob"—R. 1014) responded that "crews will not *take charge* of the train or the engines until the trains are completed". Petitioner never contended that he "took charge" of the train. Quite the contrary. His case was that while the train was in charge of the switching crew he was injured through the negligence of a switching crewman. There was, thus, no conflict between petitioner and his supervisor to create a submissible issue of contributory negligence—certainly not causative contributory negligence.

Respondent also forgets that the trial court, on the basis of this arbitrarily admitted testimony, instructed the jury that if they found that petitioner had no right to be on the incompleted train (to which no one testified) they should find for respondent (R. 1110). The jury manifestly rejected this invitation.

Twist and turn as it may, search the record as it will, the respondent will not find a shred of evidence to the effect that experienced railroaders shun coupling operations as dangerous. Respondent's argument throughout the trial was based on this unproved idea—that experienced railroadmen know that coupling operations are dangerous—

"all that weight moving around." Of course, all railroad operations involving movement have some element of danger in them. That is why the Congress enacted the FELA. If knowledge of the risk of railroading were to be a complete defense, few railroaders would recover under the FELA. That is why, by the 1939 Amendment, the Congress abolished the defense of assumption of risk. Because railroad counsel, as in the case at bar, continued to urge assumption of risk situations as contributory negligence this Court forbade trial courts from allowing assumption of risk to be revived under the guise of contributory negligence: *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943). This is the root of the evil. It calls out loudly for a new trial on the issue of damages alone.

Moreover, petitioner does not "act" under the assumption "that the average juror is thoroughly conversant with the legal doctrine of assumption of risk". Rather, petitioner thought he had made clear in his petition that a railroad argument sounding in assumption of risk should be squashed immediately by the trial court, or failing that, the jury should be instructed respecting the legal boundary between assumption of risk and contributory negligence, with a proper explanation of the difference between contributory negligence and assumption of risk and that assumption of risk is not a legal defense in these cases.

Finally, and here again respondent opens yet another error by the trial court, it is argued that the jury may have disbelieved Stager's testimony that he was braced for the normal jolt of coupling since the fireman was not injured.[1] Actually, there were two other crew members on the engine. Neither were injured. The brakeman, Almond, was called by petitioner and was fully cross-examined but not, as noted in the petition, on the subject of bracing. The fireman,

1. General George S. Patton, Jr., had his neck broken in an accident which only shook up the three other occupants of the car in which he was a passenger: Patton: *Ordeal and Triumph*, by Ladislas Farago, July, 1965 edition, p. 788.

Johnson, was not in the cab, but was checking the engine when the accident happened. He was called by the respondent, and asked a few innocuous questions. When petitioner sought on cross-examination to bring out all the details of the accident, the trial court anticipated its later, more harmful, error curtailing Dr. Perlmutter's testimony, by forbidding all questions beyond the scope of the direct (R. 942). Actually, on his pre-trial deposition, which is included in the record, Johnson had quite a lot to say about the effect of the accident on him. Respondent, in broaching the subject of the fireman, has apparently forgotten that Johnson's deposition is available or it assumes, perhaps, that this Court does not read the record.

Respondent has failed to demonstrate any record evidence of contributory negligence or to counter petitioner's demonstration that the contentions advanced as contributory negligence sound in assumption of risk.

(4) The Jury Could Have Believed That Petitioner Was Not Disabled From the Testimony of His Own Doctor.

Respondent seeks comfort in the testimony of Dr. Pollard, an operating neurosurgeon called as petitioner's witness. It is small comfort indeed. Dr. Pollard test fied that he did a major surgical procedure and removed a herniated disc from petitioner's back. He concluded that from the economic aspect, the effect on petitioner of his surgery was that "this man never got better enough to even make an honest try of working" (R. 853). The subsequent course of his medical history revealed additional major surgery on petitioner's back in Philadelphia by famed Dr. Henry Wycis, Professor of Neurosurgery, who concluded that petitioner would never be able to work at railroading again. All of this would have been substantiated by Dr. Perlmutter, the neutral court-appointed doctor, had the trial judge afforded due process and engaged in fair play and allowed the doctor on cross-examination by petitioner's counsel, as a railroad witness, to tell

what he actually knew up to the last minute. This is the hard core of the grave injustice done to petitioner by the strange trial rulings of this misguided trial court.

The short and crushing answer to respondent's contention, is that if his own doctor so testified to Stager's detriment, then it was all the more essential if truth and justice were to be subserved, that the totally contradicting testimony of the court-appointed doctor testifying for the railroad be brought to the attention of the jury. In any event, by asserting a lesser degree of disability than that revealed in the proffered, but excluded, testimony of the court-appointed doctor, respondent destroys the notion of the appellate court below that the excluded evidence was "cumulative" (Brief in Opposition, p. 12).

Conclusion.

This case presents nothing more than Stager's right to have a jury of his peers consider the evidence he had to support his cause; to test that adduced in defense by cross-examination; and to have the jury properly enlightened on the law applicable to the evidence. Stager asks if it is the law that an honest workman is negligent when he earns his pay by doing what he was employed to do (R. 767). He doubts whether under any other circumstances the respondent would censure him for commencing work as soon as he signed on and started to draw his pay.

Respectfully submitted,

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